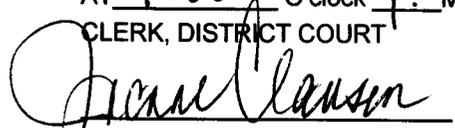


STATE OF IDAHO)
County of KOOTENAI)^{SS}

FILED 12/9/19

AT 4:00 O'clock P. M
CLERK, DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 JACOB RUSSELL MOORE,)
)
 Defendant.)

Case No. **CRF 2012 15694**
CRF 2014 2586
CRF 2014 22191
CRF 2014 22818
CRF 2017 23434
**MEMORANDUM DECISION AND
ORDER DISMISSING MOTION FOR
MODIFICATION OF SENTENCE
PURSUANT TO I.C.R. 35(b) FILED ON
NOVEMBER 12, 2019, IN CRF 2012
15694, CRF 2014 2586, CRF 2014
22191, AND CRF 2014 22818; AND
DENYING SAID MOTION IN
CRF 2017 23434**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

On December 9, 2019, this Court reviewed the Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support of Motion, filed on November 12, 2019. That motion recognizes that a previous I.C.R. 35 motion had been filed on November 6, 2018, but posits whether the Court at the December 20, 2018, hearing on that motion was “heard by the Court on a Rule 35 basis, [or] as a continuance of jurisdictional review.” Mot. for Recons. of Sentences Pursuant to I.C.R. 35, 1. A review of the Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in

Support of Motion filed on November 6, 2018, makes it clear defendant Jacob Russel Moore (defendant) was filing an I.C.R. 35 Motion. A review of the minutes of the December 20, 2008, hearing on the Motion for Modification of Sentence Pursuant to I.C.R. 35(b), makes it clear the Court considered it to be a motion brought and heard under I.C.R. 35. In fact, a review of those minutes show the Court pointed out to defendant and to his counsel that defendant had previously filed I.C.R. 35 motions in CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818, and thus, only had the capability of having an I.C.R. 35 Motion brought in CRF 2017 23434. Nevertheless, the Court, giving defendant all benefit, found its ruling on the Rule 35 motion filed on November 16, 2018, to not be a Rule 35 decision, but rather, since the time period had yet to expire on his retained jurisdiction, the Court found it would simply place defendant on probation, and “alternatively” do so on an I.C.R.35 basis (in the event that viewing the decision made within the jurisdictional limits of a retained jurisdiction were found to be illegal). However, the fact remains that on May 3, 2016, this Court held a hearing in CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818, and granted I.C.R. 35 relief to defendant, changing his disposition from imposition of his prison sentences to a period of retained jurisdiction, so that he, if successful on his retained jurisdiction, could begin Mental Health Court. Later that same day, the Court entered its order to that effect in in CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818.

II. ANALYSIS.

A. The I.C.R. 35 Motions in cases CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818, are dismissed.

Thus, in case number in CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818, this is a successive I.C.R. 35 motion, which is prohibited. *State v. Heyrend*, 129 Idaho 568, 929 P.2d 744 (Ct. App. 1996); *State v. Wolfe*, 158 Idaho 55, 343

P.3d 497 (2015). As set forth above, the Court has previously found this to be the legal status of these cases. Accordingly, the Motion(s) for Modification of Sentence Pursuant to I.C.R. 35(b) filed on November 12, 2019, in CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818 are dismissed.

B. The I.C.R. Motion in Case No. CRF 2017 23434, is denied.

Defendant, at the present time, has the legal ability to file an I.C.R. 35 motion in CRF 2017 23434, and has done so on November 12, 2019. Defendant requested a hearing on this motion. Mot. for Recons. of Sentences Pursuant to I.C.R. 35, 6. Even though a hearing was requested, the decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally imposed sentence is directed to the sound discretion of the district court. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct.App. 1994). This Court concludes a hearing is not necessary and would be a waste of time.

In case number CRF 2017 23434, defendant “requests the Court reconsider and modify his sentences to allow for a reduction of the determinate and/or indeterminate portions of his sentences, or in the alternative, allow Mr. Moore an opportunity to complete a retained jurisdiction.” Mot. for Recons. of Sentences Pursuant to I.C.R. 35, 2.

On December 23, 2017, while on probation in the four older cases (CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818), defendant was charged with possession of a controlled substance (methamphetamine) and possession of paraphernalia. On April 5, 2017, defendant pled guilty to this charge in CRF 2017 23434. On June 6, 2018, this Court sentenced defendant as follows:

**CRF 2017 23434 - POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE), (a felony), I.C. 37-2732(c)(1), committed on December 23, 2017 — to the custody of the Idaho State Board of Correction for a fixed term of THREE (3) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SEVEN (7) years.
THIS SENTENCE IS CONSECUTIVE TO ALL OTHER SENTENCES**

PREVIOUSLY IMPOSED IN CRF 2017 23434 [should have read CRF 2012 15694 and CRF 2014 2586], CRF 2014 22818 and CRF 2014 22191.

At that hearing, this Court retained jurisdiction again on defendant. On October 31, 2018, following his period of retained jurisdiction, this Court relinquished jurisdiction in all cases and imposed defendant's prison sentences. On December 20, 2018, as set forth above, this Court found it had time left on the period of retained jurisdiction, and placed defendant on probation. On August 26, 2019, defendant was taken into custody on an Agent's Warrant, for being terminated from the Good Samaritan Rehabilitation program, for failing to live at his approved residence, and for using methamphetamine. Agent's Warrant, 1; August 27, 2019, Aff. in Supp. of Probation Violation, 1. A Report of Violation was issued on August 30, 2019, but not filed until September 16, 2019. That report reiterated the allegations in the Agent's Warrant, and added the allegation that in 2019 on twenty-five occasions he failed to drug test. Report of Violation, 2 ¶ 5. On October 2, 2019, defendant denied these allegations and an evidentiary hearing was scheduled. On October 29, 2019, and evidentiary hearing was held, and at the conclusion of that hearing, this Court found all allegations had been proven. Probation Violation Disposition, 1. On November 12, 2019, counsel for defendant filed the Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support of Motion which is the subject of this Memorandum Opinion and Order.

1. Defendant has not set forth a valid basis for his motion, nor has he set forth any evidence to support his motion.

In his I.C.R. 35 Motion, counsel for defendant writes:

Additional Evidence for Consideration & Request for Hearing

Mr. Moore intends to provide additional evidence in the form of testimony and potential documentation for the Court's consideration.

Mot. for Recons. of Sentences Pursuant to I.C.R. 35, 6. This is not sufficient. Where a

sentence as originally imposed is not illegal, the defendant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). “To establish that the sentence imposed was improper, the defendant must show that in light of the governing criteria, [the] sentence was excessive under any reasonable view of the facts.” *Id.* (quoting *State v. Broadhead*, 120 Idaho 141, 143-45, 814 P.2d 401, 403-05 (1991) (citations omitted)). When a defendant does not identify what evidence he or she might have produced at a hearing that could not have been produced through affidavits, the district court does not abuse its discretion in refusing to hold a hearing on his or her Rule 35 motion. *State v. Ramirez*, 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). Specifically, the Idaho Court of Appeals held:

This Court has previously held that while a defendant is entitled to be present at sentencing and at resentencing when a prior invalid sentence is corrected, no such right exists on a motion to reduce a sentence. *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App.1986). “Indeed, the decision whether even to conduct a hearing on a Rule 35 motion has always been discretionary with the district court.” *Id.* A trial court abuses its discretion on whether to hold a hearing on a Rule 35 motion when it unduly limits information considered in deciding the motion. *James*, 112 Idaho at 242, 731 P.2d at 237. Ramirez has failed to show that the district court unduly limited the available information in this case. Ramirez does not even identify what evidence he might have produced at a hearing that he was unable to produce through the affidavits which were submitted.

Id. (footnote omitted). Here, defendant did not set forth any evidence that could be adduced. The Court cannot be required to guess at what evidence defendant might present in support of his Rule 35 Motion. Accordingly, defendant’s Rule 35 Motion must be denied due to that failure.

2. Defendant’s Motion has no merit.

A motion to reduce sentence is a motion for leniency. *State v. Strand*, 137 Idaho 457, 463, 50 P.3d 472, 478 (2002); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The decision to grant or deny leniency is left to the sound discretion of the court.

Strand, 137 Idaho at 463, 50 P.3d at 478; *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989).

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. *State v. Arambula*, 97 Idaho 627, 550 P.2d 130 (1976). Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe. *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984). . . .

However, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion.

State v. Forde, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); see also *State v. Adams*, 137 Idaho 275, 278, 47 P.3d 778, 781 (Ct. App. 2002).

For a sentence to be considered “reasonable” at the time of sentencing the court must consider the objectives of sentencing: whether confinement is necessary to accomplish the objective of protection of society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the case. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). This requires the court to focus on “the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982).

As noted by the Court at the October 29, 2019, hearing, the Court finds that over the last several years, for whatever reason, defendant is “regressing”, defendant is getting worse in his struggles with addiction and criminal thinking. The Court found defendant to be “defiant.” Defendant has been on five different periods of retained jurisdiction. Defendant has tried Mental Health Court, and failed that. Defendant has tried Good Samaritan Rehabilitation program, and failed that. The Court simply has nothing available in the community for defendant. Nothing utilized to the present has rehabilitated defendant, nothing utilized in the community has kept the public safe from defendant. The Court has

been exceptionally patient with defendant, and defendant has not taken advantage of any of the programming and treatment options given to him, at least not on any sustained basis.

The Court finds the sentences originally imposed were reasonable, and specifically finds the sentence imposed in CRF 2017 23434 was reasonable. The Court finds the imposition of those sentences was a reasonable decision for the reasons set forth on the record on October 29, 2019. This Court strongly felt the only way to keep the community safe (both from defendant via incapacitation, and as a deterrence to others) was to impose those specific prison sentences. Nothing has changed since imposition of those sentences. The Court cannot keep the public safe other than by imposition of these sentences. The Court's primary responsibility is to protect the public. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (1982). This Court concludes that imposition of defendant's prison sentence in CRF 2017 23434 was necessary for the protection of society and the deterrence of defendant and others.

III. ORDER.

IT IS THEREFORE ORDERED that defendant Jacob Russel Moore's Motion(s) for Modification of Sentence Pursuant to I.C.R. 35(b) in cases CRF 2012 15694, CRF 2014 2586, CRF 2014 22191 and CRF 2014 22818, are **DISMISSED**.

IT IS FURTHER ORDERED that defendant Jacob Russel Moore's Motion for Modification of Sentence Pursuant to I.C.R. 35(b) in CRF 2017 23434 is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, JACOB RUSSELL MOORE, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an

appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer.

DATED this 9th day of December, 2019.

John T. Mitchell
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of December, 2019 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Jeanne Howe *pdfax@kcpv.us*
Prosecuting Attorney – *kcpa@courts.kcbo.us*
centralrecords@idoc.idaho.gov

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
By: *Jane Lawson*
Deputy